

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1639

IN THE MATTER OF:

Petition of THE GRAY LINE, INC.,)	Served December 28, 1976
to Institute an Investigation into)	
the Reasonableness of Sightseeing)	Docket No. 248
Commissions)	

By Order No. 1275, served September 6, 1973, the Commission granted the petition of The Gray Line, Inc., instituted a formal investigation into the reasonableness of the rate of commissions paid to agents and others for the generation of passengers for sightseeing service, and scheduled a public hearing on the matter. The stated purpose of the investigation was to inquire:

1. Whether the rates of commission paid by carriers to agents and others for the generation of passengers for sightseeing services result in passenger fares which are unjust, unreasonable or unduly preferential within the meaning of Article XII, Section 6 of the Compact;
2. Whether the terms and arrangements for payment of commissions to agents and others for the generation of passengers for sightseeing services constitute a "practice" required to be published and observed pursuant to Article XII, Sections 5 and 6 of the Compact;
3. Whether the rates of commission paid by carriers to agents and others for the generation of passengers for sightseeing services have an unreasonable effect upon the adequacy of the sightseeing service offered by the carrier;

4. Whether the rates of commission paid by carriers to agents and others for the generation of passengers for sightseeing services have an unreasonable effect upon the carriers' rates of return and, if so, whether the carriers' accounts, records and reports may properly charge all or a part of such commission payments as direct operating costs rather than as a part of profits;

and to explore relevant matters thereto. Pursuant to said order, a public hearing was held on October 2, 1973, and witnesses testified on behalf of (a) The Gray Line, Inc., and (b) D. C. Transit System, Inc., and Washington, Virginia and Maryland Coach Company, Inc., a wholly-owned subsidiary of D. C. Transit System, Inc. 1/

PRELIMINARY MATTERS

Before summarizing the pertinent facts herein, two procedural matters require disposition.

At the hearing, the Administrative Law Judge ordered stricken certain testimony of witness Herman Vogel, regarding the profitability and efficiency of D. C. Transit System, Inc., pending the receipt of pertinent supporting documentation. The Commission's records indicate that no such documentation was tendered for filing. Consequently, the stricken statements will receive no consideration by the Commission.

Also, the record contains a motion of Gray Line, filed December 10, 1973, for extension of the date on which post-hearing briefs were to be filed, which motion has not been

1/ These parties shall hereinafter be referred to by appropriate short titles. The position of WV&M shall be subsumed in that of D. C. Transit unless otherwise indicated and shall not separately be set forth.

the subject of a Commission order. By Order Nos. 1279 and 1287, similar motions of Gray Line were granted, extending the filing date from November 5, 1973, to November 26, 1973, and from November 26, 1973, to December 10, 1973, respectively. The above-referenced motion sought an extension to December 26, 1973, and Commission records indicate that no such brief has yet been filed. Consequently, we find that Gray Line's motion of December 10, 1973, is moot and does not require formal disposition. In any event, the said motion, if ruled upon, would be denied inasmuch as (1) Gray Line had previously warranted to the Commission that no further extension of time was contemplated, and (2) the motion fails to set forth any proper and sufficient cause for granting the relief sought.

PERTINENT FACTS

Petitioner Gray Line filed a prepared statement (which was received in evidence at the hearing) urging that the Commission establish maximum commission rates of 15 percent for agent sales of individually ticketed sightseeing tours 2/

2/ As used herein, the terms "commission" or "rate of commission", as appropriate, refer to any fee, rebate, discount, bonus, incentive, remittance, allowance, remuneration, or any other amount or consideration of any kind, whether in cash, goods, services or anything else of value whether paid directly or indirectly.

As used herein, the term "agent sales" means the sale of tickets or other booking of individually ticketed transportation services by a person who is not a regular employee of the carrier providing the transportation service, and whose remuneration for such sale or booking consists of a commission as defined above.

and 10 percent for agent sales of charter services. 3/ The jurisdiction of the Commission so to do is said to be conferred by the Compact, Title II, Article XII, Section 6(a)(4), and petitioner contends that payment of inordinately high commissions mitigates against a carrier's opportunity to earn the 6.5 percent return mentioned in the above-cited section. Petitioner also urges that commissions are direct operating expenses, and believes that publication of rates of commission in WMATC tariffs would be contrary to the public interest and sound regulatory practices.

Gray Line conducts operations in Las Vegas, Nev., and Los Angeles, San Diego, Anaheim, and Palm Springs, Calif., in addition to those performed in the Metropolitan District, and it is a member of Gray Line Sight-Seeing Companies Associated, an international association of sightseeing companies. Petitioner's Exhibit No. 1 sets forth rates of commission for individually ticketed agent sales as paid in Banff, Alberta, Canada and 14 American cities including the 10 most populous cities in the United States. Generally, these data, as compiled from tariffs issued by Gray Line Associated and American Sightseeing International, 3A/ show that rates of commission vary from 6 to 22 percent. In cities where both tariffs are operative, prevailing rates of commission are as indicated: Los Angeles (10 percent), Las Vegas (10 percent), New York, N.Y. (20 percent), Chicago, Ill. (from 10 to 20 percent), Boston, Mass. (10 to 15 percent), and Miami, Fla. (10 to 15 percent). Petitioner's other exhibits indicate that a regulation limiting commissions would improve petitioner's operating ratio from an actual 97.8 in fiscal year 1973 to 95.1, 95.9, or 96.7 assuming commission rates of 10, 15, or 20 percent, respectively. They also projected a decrease in commissions from an actual 9.1 percent of gross operating revenues to 3.9, 5.5, or 7.1 percent of gross operating revenue, again assuming commission ceilings of 10, 15, or 20 percent, respectively. The witness for Gray Line also testified that commissions paid

3/ Commissions on charter operations are not at issue herein.
3A/ American Sightseeing International is also an association of sightseeing companies.

by airlines average 8 percent and that steamship companies generally pay from 10 to 17 percent.

Pursuant to Order No. 1267, served July 11, 1973, several carriers subject to this Commission's jurisdiction provided information concerning their rates of commission. 4/ These factual data were incorporated into the record of this proceeding without objection and are summarized below.

CARRIER	RATES OF COMMISSION		
	<u>AGENT</u> <u>SALES</u>	<u>SELF</u> <u>SALES</u> <u>5/</u>	<u>CHARTER</u>
Blue Lines, Inc.	30%	20%	10%
White House Sightseeing, Inc.	20	NONE	10
Dawson's Charter Service, Inc.	NONE		
D. C. Transit	40 <u>6/</u>		
WV&M	40		
Gray Line	30	15	10
Vernoy Franklin	NONE		
Keller Bus Service	NONE		
Atwood's Transport Lines, Inc.	10-20		
Eyre's Bus Service, Inc.	NONE		

4/ Order No. 1275, served September 6, 1976, makes each carrier performing sightseeing services a formal party to this investigation.

5/ As used herein, the term "self sales" refers to situations where a regular employee of the carrier providing the transportation service actually sells the ticket or booking at some location other than the carrier's regular place of business, and a commission is paid to the owner or administrator (e.g. a hotel manager) of the location at which such employee conducts business.

6/ Commissions are paid on the net transportation price exclusive of additional fees for admissions, meals, etc. For example, on a \$13 ticket, \$3 of which is allocable as payment for a meal, the commission would be 40 percent of \$10 or \$4. This computative practice appears to be in common usage by the sightseeing transportation industry.

The witness for Gray Line testified that approximately 65 percent of its sightseeing ticket sales are a result of local agent sales or self sales. Approximately 10 percent are sales made at Gray Line's own office and the balance are generated by out-of-town agents who generally receive a commission of 20 percent of the net transportation price. The witness stated that Gray Line's sightseeing operations have been profitable despite the current commission rate structure, but believed that the operation would not be profitable if Gray Line paid commissions of 40 percent. Should its prayer be granted, petitioner does not anticipate lowering current fares, but hopes that "inevitable" tariff increases may be delayed.

Testimony presented by replicant D. C. Transit indicates that its sightseeing ticket sales consist almost exclusively of agent sales. D. C. Transit pays these agents a 40 percent commission and claims to have done so for over a decade. The majority of these agents are located in suburban motels and typically each generates a small volume of sightseeing business. 7/ Assertedly, they would not actively solicit tour customers if commission rates were reduced below 40 percent, and replicant states that it could not survive such a contingency. Replicant's agents work pursuant to letters of agreement and assertedly are not contractually committed to promoting D. C. Transit's tours. High commissions allegedly are needed as an incentive to these agents, although replicant admitted that it is in the self-interest of a motel operator to promote activities which encourage people to extend their visits in the metropolitan area.

7/ D. C. Transit's gross sightseeing revenue for the period January 14, 1973, through mid-September, 1973, was approximately \$80,000. Approximately 70 percent of this gross was generated by agents whose individual sales did not exceed \$5,000.

In its post-hearing brief, replicant contends that this Commission lacks jurisdiction to grant the relief sought herein. The Compact, Title II, Article XII, Section 6(b), provides, as pertinent, that when "... any regulation or practice affecting such fare (for transportation subject to this Act), is unjust, unreasonable or unduly preferential or unduly discriminatory, the Commission shall issue an order prescribing the lawful fare, regulation, or practice thereafter to be in effect." Assertedly, the record fails to support the proposition that the practice (commission rates) under investigation affects fares within the meaning of the Compact and, therefore, no Commission order may issue. In addition, D. C. Transit believes that rate of commission is purely a management decision and regulation by the commission would constitute an unwarranted regulatory invasion into replicant's internal business practices.

D. C. Transit also asserts that the proposed regulation would be anticompetitive and detrimental to the continued ability of smaller carriers to render adequate and continuous service. Gray Line, which is the largest carrier in terms of revenue, equipment, and number of agents, would assertedly be able better to sustain the decrease in revenue which replicant claims would result should the relief sought be granted.

JURISDICTION

Petitioner contends that the Commission is authorized to modify existing tariffs should it be found that commissions paid thereunder are so excessive as to be unjust or unreasonable. Replicant, as noted, disputes this position and asserts that, in any event, rates of commission is a matter best left to the sound discretion of management.

Generally, we agree that control over matters such as commissions, salaries, and other operating expenses is best left to the prudent judgment of competent management. The Commission, nevertheless, is not absolutely bound to accept

the judgment of those carriers, nor does the Compact allow it to suffer the continuance of unjust, unreasonable or discriminatory practices in contravention of the public interest. So to do would be tantamount to an abrogation of the Commission's statutory responsibility.

The Compact grants the Commission broad powers in this respect. Title I, Article II, provides "The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of transit ...", and Title I, Article XI, Section 2, mandates that "In accordance with the ordinary rules for construction of interstate compacts, this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." The Commission's power to prescribe fares, regulations and practices is set forth in Title II, Article XII, Section 6 of the Compact, and subsections (3) and (4) thereof enumerate several factors for us to consider in exercising this power. 8/ As can readily be seen, the Commission has an

8/ (3) In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service. (4) ... the opportunity to earn a return of at least 6½ per centum net ... shall not be considered unreasonable.

affirmative duty to act when a so-called "management decision" generates repugnant consequences.

Moreover, we must reject replicant's assertion that no causal connection between rates of commission and transportation fares has been established. Both Gray Line and D. C. Transit clearly testified that they consider commissions to be a direct operating expense. Accordingly, this expense incurred by the carriers is relied on in justifying a representation to this Commission that a proposed fare is just, reasonable and nondiscriminatory. It would be ludicrous to find that commissions are a tariff-related cost factor for the purpose of rate making and now conclude that commissions have no bearing on effective transportation fares.

Accordingly, we conclude that this Commission has jurisdiction to determine whether commissions paid to persons selling individually ticketed sightseeing tours are unjust, unreasonable, or unduly preferential or discriminatory and to issue an appropriate order in relation thereto.

DISCUSSION AND CONCLUSIONS

As set forth above, Order No. 1275 posed four specific questions for resolution. In answer to these queries, the Commission now finds:

1. Rates of commission paid by carriers to agents and others for the generation of passengers for individually ticketed sightseeing services, to the extent said rates of commission exceed 20 percent and are considered to be transportation operating expenses, result in passenger fares which are unjust and unreasonable within the meaning of Title II, Article XII, Section 6, of the Compact.

2. The terms and arrangements for payment of commissions to agents and others for the generation of passengers for individually ticketed sightseeing services does not constitute a "practice" required to be published and observed pursuant to Title II, Article XII, Section 5 of the Compact.

3. The rates of commission paid by carriers to agents and others for the generation of passengers for individually ticketed sightseeing services, to the extent said rates of commission exceed 20 percent and are considered to be transportation operating expenses, have an unreasonable effect upon the adequacy of the sightseeing service offered by a carrier.

4. The rates of commission paid by carriers, to agents and others for the generation of passengers for individually ticketed sightseeing services, to the extent said rates of commission exceed 20 percent and are considered to be transportation operating expenses, have an unreasonable effect upon the carrier's rate of return, and, accordingly, the carrier's accounts, records and reports may not properly charge that part of such commission payments as results from paying rates of commission in excess of 20 percent as a direct operating cost, but must account, record, and report said excess as a deduction or distribution from profit.

The justness and reasonableness of a carrier's rates and practices related thereto are questions involving a balancing of carrier and consumer interests. In this proceeding, it is clear that carriers engaged in providing individually ticketed sightseeing services desire to have as many agents as possible generating sales on their behalf. Presumably, agents would be more willing to sell tickets commissionable at the highest possible rate, and a carrier seeking some advantage in the highly competitive Metropolitan District market is naturally

tempted to outbid its competitors by offering higher rates of commission. This practice has evolved to the point where D. C. Transit and its affiliate, WV&M, have been paying 40 percent commissions and other carriers, including Gray Line and Blue Lines pay commissions as high as 30 percent. The evidence also shows that many agents are non-exclusive and tend to promote those tours affording the highest commissions with little, if any, regard for the quality of the tour.

The evidence is undisputed that higher commissions have required higher fares to the obvious detriment of the sightseeing public. For example, Gray Line's commission expenses for fiscal year 1973 were 9.1 percent of gross operating revenues, while, for the same period, that carrier's overall operating ratio was 97.8. Clearly, excessive commissions have a negative impact on a carrier's rate of return and deprive the sightseeing public of adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

Excessive commissions, like any unreasonable expense, have a deleterious effect on the adequacy of service offered by a carrier to the public. Revenues consumed by payment of inordinately high commissions are unavailable for maintenance, purchase of new transportation equipment, or other expenditures from which the sightseeing public may derive some tangible benefit.

Moreover, the amount of commission expense is dependent on the amount of revenues, and both items increase proportionately. Thus, the greater the commission the higher the fare structure and the higher the fare structure the greater this operating expense. The Commission has previously stated that this form of interrelationship between revenues and expenses is contrary to the public interest. See Order No. 1332, served June 10, 1974.

We find no justification for any rate of commission paid by carriers to agents or others for generation of passengers for sightseeing service in excess of 20 percent. D. C.

Transit produced no probative evidence in support of its contention that lower commissions would have a negative impact on either rates or revenues. Commissions of 20 percent are paid by White House Sightseeing, Inc., and Atwood's Transport Lines, Inc., without any apparent adverse financial affect. The uncontroverted evidence submitted by Gray Line about rates of commission in other large American cities shows that only in Philadelphia, Pa. (22 percent) do commissions exceed 20 percent, while in all other cities commissions are paid at rates varying normally from 10 to 20 percent. We feel that this upper limit represents the point at which healthy competition degenerates to destructive competition.

The Commission also finds that the terms and arrangements for payment of commissions are not matters that require publication in a carrier's tariff. Although excessive commissions, like excessive salaries or other unreasonable expenses, if considered as operating expenses, would inflict an undue burden on the public in the form of higher fares, we feel that a carrier's expenses, reasonable or otherwise, are more properly reported in its books and accounts than in its public tariffs. We can see no benefit to the carriers, the public or the regulatory process that would be derived from tariff publication of rates of commission. The Commission shall, however, require that all carriers engaged in sightseeing operations keep and maintain on file for a period of three years complete records showing the rates of commission paid to agents and others, and such records shall be subject to inspection by the Commission upon demand therefor. 9/

Having found that payment of commissions in excess of 20 percent when treated by the carrier as a direct operating expense is an unjust and unreasonable practice affecting transportation fares, it is the duty of the Commission to prescribe the lawful practice hereafter to be in effect. 10/ Petitioner urges that said prescription take the form of a regulation forbidding payment of excessive commissions. We are of the opinion, however, that adequate protection of the

9/ See Title II, Article XII, Section 10 of the Compact.

10/ See Title II, Article XII, Section 6(b) of the Compact.

public interest can be accomplished without resort to such a universal prohibition. Accordingly, the Commission declines to issue the industry-wide ban desired by petitioner. In this connection, we are also mindful of D. C. Transit's arguments relating to the effect of a flat prohibition on competition and the need for some management discretion.

The Commission therefore finds that any commission paid to agents or others at a rate in excess of 20 percent of the net transportation price of the involved sightseeing service exclusive of taxes, admissions, meals and like items, shall not be allowable as an operating expense for the purpose of establishing the justness or reasonableness of any proposed tariff, change, or supplement to a tariff. In the event a management decision is made to pay a commission in excess of 20 percent, said excess shall be considered by the Commission as being paid from the net profit of the carrier. This action preserves for management some flexibility while protecting the public and promoting adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

The Commission has considered all other matters raised by the parties and finds that no action contrary to that now directed is warranted.

THEREFORE, IT IS ORDERED:

1. That all carriers conducting individually ticketed sightseeing operations within the Metropolitan District be, and they are hereby, directed to keep and maintain on file for a period of three years adequate and complete records and accounts listing (a) all agents and others to whom commissions are paid for the generation of passengers for sightseeing service, (b) the rates of commission at which said agents or others are paid, and (c) the gross dollar amount of all sales and commissions, individually and in the aggregate.

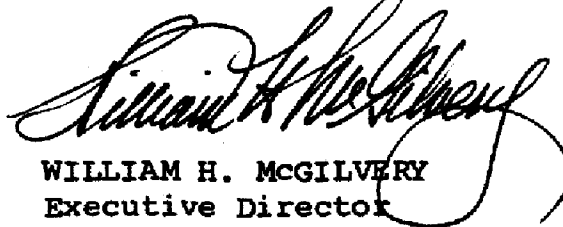
2. That rates of commission in excess of 20 percent of the net transportation price paid to agents or others for

the generation of passengers for sightseeing service be, and they are hereby, declared to constitute unreasonable operating expenses and shall not be allowable as justification for any proposed tariff, change or supplement to a tariff.

3. That, except to the extent granted herein, the petition of The Gray Line, Inc., be, and it is hereby, denied.

4. That the investigation instituted herein by Order No. 1275, served September 26, 1973, be, and it is hereby, discontinued.

BY DIRECTION OF THE COMMISSION:



WILLIAM H. MCGILVERY
Executive Director